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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual, Plaintiff, v. DAVID MCNEELY, an individual; 5 ALPHA INDUSTRIES, LLC, a Nevada limited liability company, and DOES I through X, and ROES I through X, inclusive, Defendants.	Case No. CV22-02015 Dept. No. D15 **DEFENDANTS DAVID MCNEELY AND 5 ALPHA INDUSTRIES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND COUNTERMOTION FOR PROTECTIVE ORDER**

Defendants David McNeely and 5 Alpha Industries, LLC ("5 Alpha") (collectively "Defendants") submit this Opposition to Plaintiff's Motion to Compel and Countermotion for Protective Order based on the following Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument that the Court elects to entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this case, Plaintiff's claims are based on Defendants' use of a GPS device to monitor the location of Plaintiff's vehicle as part of an investigation into Plaintiff. Defendant McNeely is a licensed private investigator in the State of Nevada and owner of 5 Alpha. Plaintiff has not alleged that the use of the device was prohibited by Nevada law—nor was it.

In the Motion, Plaintiff seeks an order compelling Defendants to produce documents sufficient to identify the client(s) who hired Defendants to investigate Plaintiff, referred to herein as the Confidential Client(s). This dispute is taking place pre-discovery pursuant to a previously granted *ex parte* motion that allowed Plaintiff to serve Defendants with both process and a subpoena. Defendants have filed a motion to dismiss, which remains pending.

As shown below, the identity of the client(s) who hired Defendants to investigate Plaintiff is protected and confidential information under NRS 648.200 and NRS 49.325. The information implicates important competing interests. On the one hand, there are Defendants' interests to honor the confidentiality expectations of their client, comply with Nevada law, and to be able to continue to make a living as a private investigator because the business repercussions of disclosing a client identity would likely be ruinous for his private investigation practice. On the other hand, there is Plaintiff's interest in pursuing claims against the Confidential Client(s).

Given this, the issue is when and how such confidential information should be disclosed and used, or, if there is any way to render such disclosure unnecessary. Plaintiff's proposed outcome—immediate and public disclosure—is not the answer. As detailed below, better alternatives exist. For instance, as is typical in trade secret litigation, discovery could be phased to determine whether Plaintiff's claims against Defendants have merit. If the claims against Defendants do not have merit, there is no need for the disclosure of the confidential information. Fortunately, there is no rush to make this determination given the early stages of this matter.

At bottom, the crux of the Motion is whether a private investigator should be compelled to produce confidential information that could be ruinous to his or her business prior to even having an opportunity to test the allegations in a complaint. At this juncture, the interests of justice warrant patience and further development of the facts, not a rush to judgment or disclosure.

II. BACKGROUND

A. Defendants

Defendant David McNeely is a licensed private investigator in the State of Nevada. (*See* **Ex. 1** (McNeely Decl. at ¶ 3)). McNeely has operated as a licensed private investigator in the State of Nevada since 2019. (*See id.* at ¶ 4). McNeely is the owner of 5 Alpha. (*See id.* at ¶ 5). 5 Alpha is a business offering private investigator services. (*See id.* at ¶ 6). McNeely is the only licensed private investigator associated with 5 Alpha. (*See* id. at ¶ 7).

In serving as a private investigator, McNeely takes significant precautions to maintain the confidentiality of the identity of his clients and the information obtained as part of his investigations. (*See id.* at ¶ 8). For instance, he utilizes encrypted storage devices, takes steps to minimize and reduce records containing confidential information, and does not share such information outside of the business. (*See id.* at ¶ 9). With respect to the identity of the client(s) who hired 5 Alpha to investigate Plaintiff, McNeely acted consistent with these precautions to maintain the confidentiality of the client(s)' identity. (*See id.* at ¶ 10).

Based on his experience in the industry, understanding of client expectations, the size of the Reno community, and the publicity associated with this lawsuit, McNeely reasonably believes that if he discloses the identity of the client(s) who hired 5 Alpha to investigate Plaintiff, that he and 5 Alpha will face significant negative business repercussions, including losing current clients and being unable to obtain new clients, which could be ruinous for 5 Alpha and his practice as a private investigator. (*See id.* at ¶ 11).

B. Procedural History

On December 15, 2022, Plaintiff filed the Complaint, asserting eight causes of action against Defendants: (1) invasion of privacy – intrusion upon seclusion; (2) invasion of privacy – public disclosure of private facts; (3) violation of NRS Chapter 200, anti-doxxing; (4) negligence and

negligence per se; (5) trespass; (6) civil conspiracy; (7) aiding and abetting; and (8) declaratory relief. (*See* Complaint, filed 12/15/22).

On January 13, 2023, Plaintiff moved *ex parte* for leave to issue subpoenas to Defendants seeking documents sufficient to identify the individual or entity that hired Defendants to investigate Plaintiff. (*See* Ex Parte Motion for Leave to Issue Subpoenas, filed 01/13/23). Specifically, the subpoenas to McNeely and 5 Alpha both sought the following:

> Produce documents, including but not limited to engagement agreements, contracts, invoices, or payments, sufficient to identify each and every individual or entity that hired David McNeely and/or 5 Alpha Industries, LLC to conduct surveillance upon Hillary Schieve, to track Hillary Schieve's location, or to take any other action with respect to Hillary Schieve.

(*See id.*). A week later, on January 20, 2023, the Court granted the *ex parte* motion. (*See* Order Granting Motion for Leave to Issue Subpoenas, filed 01/20/23).

On January 23, 2023, Plaintiff served process and the subpoenas on McNeely. (*See* Affidavit of Service, filed 01/24/23). Two days later, counsel for Defendants objected to the subpoenas. Counsel for the parties met and conferred on January 27, 2023. On February 2, 2023, Plaintiff filed the instant Motion to Compel.

Since the Motion was filed, on February 13, 2023, Defendants moved to strike certain allegations in the Complaint and dismiss certain causes of action and claims for relief in the Complaint. (*See* Defendants David McNeely and 5 Alpha Industries, LLC's Motion to Strike and Motion to Dismiss, filed 02/13/23). That motion remains pending.[1]

III. LEGAL STANDARD

Unless otherwise limited by order of the court, parties may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claims or defenses" and "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

[1] In the Motion, Plaintiff makes various accusations regarding service of process. Defendants dispute these accusations. 5 Alpha also disputes the sufficiency of the alleged service of process upon it through the Nevada Secretary of State. That said, these issues are immaterial to the instant Motion and the parties ultimately agreed in good faith that both Defendants could and would respond to the Complaint by February 13, 2023, which happened through Defendants' Motion to Strike and Motion to Dismiss.

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." NRCP 26(b)(1).

Under NRCP 26(c), a court may, for good cause, issue an order that, *inter alia*, forbids certain discovery, limits certain discovery, or requires that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." NRCP 26(c)(1). Likewise, under NRCP 45(c)(3)(B)(i), a party may move to quash or modify a subpoena seeking "a trade secret" or other confidential information. In addition, in furtherance of the "interests of justice," a court may order discovery to be performed in a certain sequence. NRCP 26(d).

IV. ARGUMENT

A. The Identity Of The Client(s) Who Hired Defendants To Investigate Plaintiff Qualifies As Protected And Confidential Information.

Under Nevada law, both NRS 648.200 and NRS 49.325 provide protection for the identity of the Confidential Client(s).

1. NRS 648.200 protects the identity of the Confidential Client(s).

NRS Chapter 648 governs the licensing and practice of private investigators in the State of Nevada. NRS 648.200 protects information acquired by private investigators related to their services by making it unlawful for the private investigator to divulge such information, except at the direction of the employer or client for whom the information was obtained. Specifically, the statute provides the following:

> It is unlawful for any licensee or any registered employee or other employee, security guard, officer or member of any licensee:
>
> 1. To divulge to anyone, except as he or she may be so required by law to do, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained.
>
> 2. To make a false report to his or her employer or client.

NRS 648.200.

The Nevada Supreme Court examined the protection afforded by this statute in *DeChant v. State*, 116 Nev. 918, 926, 10 P.3d 108, 113 (2000). There, a party argued that the statute created an absolute privilege precluding the disclosure of any information that fell under the statute. *Id.* The Court disagreed, reasoning that the caveat "except as he or she may be so required by law," means that a district court has "discretion to compel disclosure of documents [that fall under the statute] that are relevant to trial and not covered by any other privilege." *Id.*

In exercising this discretion, a court should strike a balance between the interests for and against disclosure. *See Quinlan v. Ohio Dep't of Com., Div. of Consumer Fin.*, 678 N.E.2d 225, 230 (Ohio App. 1996); *see also Saini v. In'l Game Tech.*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006) (noting that "[d]isclosure of non-trade secret confidential information is similarly recognized as a serious harm").

Here, under the plain language of NRS 648.200, the identity of the client(s) who hired Defendants to investigate Plaintiff constitutes confidential information because the identity qualifies as "any information acquired by [the investigator]." NRS 648.200(1). Other courts interpreting similar statutes have found that the identity of a client falls within the scope of information protected by such statutes. *See Ravary v. Reed*, 415 N.W.2d 240, 244 (Mich. App. 1987) (concluding that disclosure of the identity of the client would be tantamount to disclosure of the substance of confidential communications because the confidential information is that client's desire to obtain information about the plaintiff).

Plaintiff points to *Flynn v. Superior Ct.*, 67 Cal. Rptr. 2d 491 (Cal. App. 1997) to argue otherwise. (*See* Mot. at 4). The reasoning in *Flynn*, however, is readily distinguishable. There, the California court determined that the identity of the client did not fall within the scope of the statute. *Id.* at 492. The California statute featured language similar to NRS 648.200, providing in pertinent part: "[the investigator] . . . shall not divulge to any other person, except as he or she may be required by law so to do, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained." *Id*. The California court used the phrase "for whom the information was obtained," which modifies the definition of the "employer or client," to limit the scope of the phrase "information acquired." *Id.* at 493. As such, the court

concluded that the identity of the client is not information "acquired for the client" and, thus, does not fall within the statute. *Id.* The court further based its conclusion on the reasoning that "it is inconceivable the Legislature intended to enact a privilege whereby the licensee could refuse to identify a client or employer [even in response to a court order] thereby potentially shielding the employer from any responsibility or liability." *Id.* at 494.

Under Nevada law, the reasoning in *Flynn* is not applicable. To start, under the plain language of NRS 648.200, the phrase "any information acquired by him" is not so narrow as to preclude the identity of the client. Also, it defies a plain language reading to limit the phrase "any information acquired by him" with the modifying clause at the end that serves only to modify the last antecedent—"employer or client." *See Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 880, 362 P.3d 83, 86 (2015) (providing that Nevada recognizes the "last antecedent rule of statutory construction," which provides that a modifier likely relates back to the antecedent immediately proceeding it).

Moreover, common sense dictates that when it comes to the private investigator-client relationship, there is generally no information that is more sensitive than the identity of the client who hired the private investigator. Plainly stated, it would be absurd for that critical information to fall outside the scope of the statute. *See Young v. Nevada Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) (providing that statutes should be interpreted to avoid absurd results or results that were clearly not intended); *Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washeo Cnty. Welfare Dep't*, 88 Nev. 635, 638, 503 P.2d 457, 459 (1972) ("The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results.").

In addition, the California court's concern that the Legislature did not intend to preclude discovery of the client does not apply in Nevada. In *DeChant*, the Nevada Supreme Court already held that such information could be discoverable pursuant to a court order. 116 Nev. at 926, 10 P.3d at 113.

Thus, the Court should conclude that NRS 648.200 protects the identity of the client(s) that hired Defendants to investigate Plaintiff.[2]

2. NRS 49.325 protects the identity of the Confidential Client(s).

NRS 49.325 provides a privilege for trade secrets if "the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." NRS 49.325(1). Specifically, the statute provides the following:

> 1. A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him or her, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.
>
> 2. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

NRS 49.325.

In Nevada, a trade secret is broadly defined as "information that 'derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public,' as well as information that 'is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" *Finkel v. Cashman Pro., Inc.*, 128 Nev. 68, 74, 270 P.3d 1259, 1264 (2012) (quoting NRS 600A.030(5)(a)-(b)).

Whether information constitutes a trade secret is typically a question of fact. *Finkel*, 128 Nev. at 74, 270 P.3d at 1264. The factors to consider in making this determination generally include: (1) the extent to which the information is known outside of the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; and (3) the extent and manner in which the employer guarded the secrecy of the information. *Id.*

In *Finkel*, the Court affirmed the district court's conclusion that certain information, including customer identities were trade secrets. *Id.* The Court reasoned that the information was not known outside the company and the company implemented measures to maintain the

[2] Defendants anticipate seeking a protective order at a later time related to any other information or documents that would fall within the scope of NRS 648.200.

confidentiality of the information. *Id*. Likewise, other courts have concluded that client lists constitute trade secrets where the owner of the list has taken reasonable precautions to protect the secrecy of the list's contents and the list does not embody information that is readily ascertainable through public sources. *See, e.g., Fred Siegel Co., L.P.A. v. Arter & Hadden*, 707 N.E.2d 853, 862 (Ohio 1999); *Radiology Servs., P.C. v. Hall*, 780 N.W.2d 17, 26 (Neb. 2010).

Here, the identity of the Confidential Client(s) qualifies as a trade secret under Nevada law. To begin, the identity of the Confidential Client(s) derives independent economic value from not being generally known in at least two ways. One, the Confidential Client(s) could be recruited by competing private investigators. Two, and more importantly, revealing the identity of the Confidential Client(s) could and likely would be ruinous to 5 Alpha's business and McNeely's private investigation practice. Clients of private investigators expect confidentiality. Indeed, that is the entire business model upon which the private investigation industry is based. Said another way, for a private investigator, client confidentiality is the Coca-Cola formula or the Google search algorithm.

In addition, there is no question that Defendants have taken significant measures to maintain the confidentiality of the identity of the Confidential Client(s) and the identity of the Confidential Client(s) is not readily ascertainable through public sources. Looking to the *Finkel* criteria, the identity of the Confidential Client(s) is not known outside of the business and there is no way to acquire it except through Court ordered disclosure. Next, the information is confidential and secret. Indeed, as discussed above, the information is designated as confidential by statute. Lastly, as detailed in the Declaration of David McNeely (Ex. 1), Defendants have taken significant measures to safeguard the information. Thus, the identity of the Confidential Client(s) is protected information under NRS 49.325.

In the Motion, Plaintiff's arguments to the contrary are not persuasive. Plaintiff spends much effort arguing that private investigators do not have an "absolute privilege" to shield the identity of their clients or work through the trade secret privilege. (*See* Mot. at 4:26-27 and 7-8). Yet, while trade secret protection may not provide an "absolute" privilege, that does not mean that the

information should just be casually disclosed. As detailed below, there are better alternative options for how to handle the information than the relief requested by Plaintiff's Motion.

Plaintiff further argues that "the identity of a single client is not a protectable trade secret." (*See* Mot. at 5-6). Yet, this argument lacks merit. None of the cases cited by Plaintiff have anything to do with the circumstances presented here because they do not concern the unique relationship between a private investigator and client.

At bottom, the identity of the client(s) who hired Defendants to investigate Plaintiff satisfies all the criteria for the protection afforded trade secrets under NRS 49.325.

For these reasons, the Court should conclude that the identity of the client(s) who hired Defendants to investigate Plaintiff qualifies as protected and confidential information under both NRS 648.200 and NRS 49.325.[3]

B. It Would Be Inappropriate And Premature To Order At This Time The Disclosure Of The Identity Of The Client(s) Who Hired Defendants To Investigate Plaintiff, If At All.

The question presented by Plaintiff's Motion—whether, at this time, the Court should order Defendants to reveal the identity of the Confidential Client(s)—is an important one given the competing interests. Under the protection afforded this information by both NRS 648.200 and NRS 49.325, the balancing of these interests comes down to the Court's discretion. *See DeChant*, 116 Nev. at 926-27, 10 P.3d at 113 (affording the Court discretion under NRS 648.200) and NRS 49.325 (providing that a person has a privilege to refuse to disclose a trade secret unless the privilege will tend "to conceal fraud or otherwise work injustice"); *see also* The Sedona Conference, *Commentary*

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[3] In addition, it should be noted that even if the Court concludes that the identity of the Confidential Client(s) does not fall within the scope of NRS 648.200 or NRS 49.325 (which it should not), the identity of the Confidential Client(s) still constitutes confidential information that warrants the special protection discussed in Section IV. B. below. For instance, NRCP 26(c)(1)(G) specifically recognizes that information can be either a "trade secret" or "confidential . . . commercial information." *See Saini*, 434 F. Supp. 2d at 919 (noting that "[d]isclosure of non-trade secret confidential information is similarly recognized as a serious harm"); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1456 (11th Cir. 1991) (providing that information "may be considered confidential in the context of a business relationship without rising to the level of a trade secret"); *Miles v. Boeing Co.*, 154 F.R.D. 112, 114 (E.D. Penn. 1994) ("The subject matter of confidential business information is broad, including a wide variety of business information."); *In re Aqua Dots Prod. Liab. Litig.*, 2009 WL 1766776, at *2 (N.D. Ill. June 23, 2009) ("matters whose disclosure would affect defendants with their respective competitors or in conjunction with the day-to-day operation of their business, warrant protection.").

on Protecting Trade Secrets in Litigation About Them, 23 Sedona Conf. J. 741, 793 (2022) (providing in Principle 5 that "a court does not need to make a conclusive determination as to whether a party's information qualifies as a trade secret before ordering appropriate protections. Instead, the court should determine whether that party has credibly identified the existence of a trade secret, making a particularized finding regarding the specific information that is subject to protection").

Further, even when disclosure is appropriate, proper protection must be put in place. Under NRS 49.325, "[w]hen the disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require." NRS 49.325(2). Under NRS 600A.070, "the court shall preserve the secrecy of an alleged trade secret by reasonable means," including granting protective orders, holding hearings in camera, sealing records, "[d]etermining the need for any information related to the trade secret before allowing discovery," and other protective measures. NRS 600A.070; *see also* NRCP 26(c)(1).

Yet, the reality is, when it comes to whether the Court should order the disclosure of the identity of the Confidential Client(s), and, if so, what protections should be put in place, insufficient information is available to guide the Court's determination. As explained below, it would be fundamentally unfair and improper for the Court to order the disclosure of the identity of the Confidential Client(s) at this time based purely on unsubstantiated allegations. Rather, the Court should allow phased discovery to proceed to test the merit of Plaintiff's claims against Defendants. Alternatively, to the extent that the Court does not wish to phase discovery, other options are available. Lastly, it should be noted that this decision need not be made at this early juncture.

1. The Court should not order at this time the disclosure of the identity of the Confidential Client(s).

Plaintiff seeks the immediate disclosure of the identity of the Confidential Client(s). In fact, Plaintiff sought this relief through an *ex parte* motion well before the opening of discovery.

Yet, despite Plaintiff's rush to learn this information, it cannot be ignored that the basis upon which Plaintiff seeks to discover this confidential information is unsubstantiated allegations. For instance, Plaintiff hinges her claims on the allegation that Defendants "trespassed on Schieve's

private property" to install the GPS device. (*See* Complaint at ¶ 11). But, based on publicly available reports, it appears that the Sparks Police Department concluded the opposite.[4]

In short, it would be fundamentally unfair and improper for Defendants to have to disclose confidential information that could be ruinous to their business based on unsubstantiated allegations. Fortunately, there are other options, as discussed below.

2. The Court should order discovery to proceed in phases to test the merit of Plaintiff's claims against Defendants before ordering the disclosure of the identity of the Confidential Client(s).

Here, one way to balance the competing interests at stake would be to phase discovery. *See* NRCP 26(d) (providing that "in the interests of justice" the Court may order discovery to "be used in any sequence"). This approach is consistent with NRS 600A.070(4), which envisions the preservation of confidential information by "[d]etermining the need for any information related to the trade secret before allowing discovery," and NRCP 26(c)(1)(G), which instructs courts to implement measures to limit the disclosure of confidential information.

In situations of this nature, phased discovery is not unusual. Courts regularly phase discovery to protect trade secrets and confidential information. For instance, in *M-I LLC v. Stelly*, the Southern District of Texas conducted discovery in "two phases." 733 F. Supp. 2d 759, 800 (S.D. Tex. 2010). The "first phase was to include discovery of all matters 'exclusive of trade secrets.'" *Id.* After the first phase, the defendants were "allowed to depose certain M-I engineers in order to obtain more detail as to the trade secret theft at issue." *Id.* Following the depositions, "the case was to proceed to a second round of discovery where 'trade secret information would be disclosed' pursuant to the agreed protective order." *Id.* As explained in the case, this approach was utilized to give the defendant the opportunity to contest the claims and show that no trade secrets would have to be disclosed. *See id; see also Microwave Rsch. Corp. v. Sanders Assocs., Inc.*, 110 F.R.D. 669, 674 (D. Mass. 1986) (finding that "before a plaintiff is entitled to the type of broad discovery into a

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[4] (*See* **Ex. 2** (Gormley Decl.) (authenticating Ex. 3); **Ex. 3** (Bob Conrad, *VIDEO: Private investigator says tracking Reno mayor with GPS unit was 'nothing personal,'* This Is Reno (Jan. 29, 2023), available at https://thisisreno.com/2023/01/video-private-investigator-says-tracking-reno-mayor-with-gps-unit-was-nothing-personal/ (last accessed on February 15, 2023))) (reporting that the Sparks police determined that the GPS device was not placed on Plaintiff's vehicle at a private setting).

defendant's trade secrets, it must show that other evidence which it has gathered through discovery provides a substantial factual basis for its claim" and that the plaintiff there failed to make such a showing); *Henderson v. Prop. & Cas. Ins. Co. of Hartford*, No. 2:12-CV-00149-KJD, 2012 WL 3730533, at *5 (D. Nev. Aug. 28, 2012) (granting motion for discovery to be conducted in phases where defendant sought to avoid the potentially needless disclosure of confidential information before dispositive motions were decided).

In fact, this approach more closely aligns with the typical approach of filing a complaint, performing discovery, and seeking leave to amend to add an additional defendant and/or claims prior to the deadline to amend pleadings, as opposed to the *ex parte* approach attempted by Plaintiff here.

Consistent with the foregoing, the first phase of discovery here would focus on Plaintiff's claims against Defendants and Defendants' defenses, including how the investigation transpired and Plaintiff's damages, if any. Defendants would then have an opportunity to move for summary judgment. If Plaintiff's claims against Defendants cannot survive summary judgment following the first phase, then there is no need for the disclosure of the identity of the Confidential Client(s) because liability against the Confidential Client(s) necessarily depends on the merit of Plaintiff's claims against Defendants.

If summary judgment were denied, then the door would open to the second phase of discovery: the disclosure of the identity of the Confidential Client(s), subject to proper protections, and facts and information related to Plaintiff's theories against the Confidential Client(s) and other discovery that was precluded due to the limitations in the first phase.

3. Alternatively, the Court could classify the Confidential Client(s) as a "Doe" defendant.

An alternative to phasing discovery would be to order the disclosure of the identity of the Confidential Client(s) under an attorney eye's only designation and allow discovery to proceed with the Confidential Client(s) as a "Doe" defendant, with the opportunity to further consider the confidential treatment at a later date and before trial.

This approach would be consistent with established precedent. "[M]any federal courts, including the Ninth Circuit, have permitted parties to proceed anonymously when special circumstances justify secrecy." *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000); *see also Doe No. 1 v. Wynn Resorts Ltd.*, No. 219CV01904GMNVCF, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022). In *Wynn Resorts*, the court explained that such treatment seeks to balance the need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party and that, given this, pseudonyms are appropriate in three situations: (1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of a sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution. 2022 WL 3214651, at *3.

Here, while Defendants are not necessarily in a position to argue the application of these criteria to the Confidential Client(s), it is clear that they could be satisfied in this case, given the nature of this case and Plaintiff's status as the current Mayor of Reno.

4. Lastly, the Court need not make a decision at this juncture.

The question at issue requires a delicate balancing of various important and competing interests. Given these interests and unique procedural considerations, there is no need to rush this decision. Plaintiff is seeking this relief pre-discovery because of subpoenas issued pursuant to an *ex parte* motion. Defendants submit that it would be appropriate to hold the decision in abeyance until after resolution of Defendants' motion to dismiss and the parties' Rule 16 case conference.

In sum, the identity of the client(s) who hired Defendants to investigate Plaintiff is confidential and protected information that implicates several competing and important interests. When it comes to whether, when, and how that information should be disclosed, the interests of justice dictate patience.

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V. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court deny Plaintiff's Motion to Compel, grant Defendants' Countermotion for Protective Order, and issue an order holding this matter in abeyance and protecting the identity of the client(s) who hired Defendants to investigate Plaintiff until the matter is considered further.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does not contain the social security number of any person.

DATED: February 16, 2023.

/s/ Ryan T. Gormley
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2023, a true and correct copy of the foregoing **DEFENDANTS DAVID MCNEELY AND 5 ALPHA INDUSTRIES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND COUNTERMOTION FOR PROTECTIVE ORDER** was electronically filed and served on counsel through the Court's electronic service system, unless service by another method is stated or noted, to the following:

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EXHIBIT INDEX

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